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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

ROBERT "ROBE" HERRERA,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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130 pp

QUESTION PRESENTED

1. Did the trial court err in accepting as race-neutral the prosecution's explanation for exercising its peremptory challenge to an Hispanic juror when the explanation was based on the juror's accented English?

LIST OF PARTIES

The Petitioner, Robert "Robe" Herrera, also known as Rove Herrera, Jr.;

The Respondent, United States of America;

The Co-defendants in the trial court and Appellants in the court of appeals, Jesse "Chango" Gomez, Jr., also known as Changito Gomez; Pete Carrion; Remigio "Tito" Gomez; Juan "Jon Jon" Johns; Martin "Pancake" Ortegon; Robert "Beaver" Perez; Victor "Tito" Pena; Michael Perez; Louis "Big Lou" Morales.

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A. Unpublished Opinion of the United States Court of Appeals for the Fifth Circuit, No. 99-50279; *United States of America v. Jesse "Chango" Gomez, Jr., also known as Changito Gomez; Pete Carrion; Remigio "Tito" Gomez; Robert "Robe" Herrera, also known as Rove Herrera, Jr.; Juan "Jon Jon" Johns; Martin "Pancake" Ortegon; Robert "Beaver" Perez; Victor "Tito" Pena; Michael Perez; Louis "Big Lou" Morales* (On Appeal from the United States District Court for the Western District of Texas (SA-98-CR-265-6))

B. Order Denying Rehearing

C. Verdict in Cause No. SA-98-CR-265-6

D. Portion of Transcript Concerning Mr. De La O and *Batson* Challenge

E. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

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OPINIONS BELOW

The opinion of the court of appeals is unpublished. (App. A.) The district court did not issue an opinion on the verdict. (App. B.)

JURISDICTION

The court of appeals entered its judgment on September 16, 2002. (App. A.) The court denied timely-filed motions for rehearing on November 8, 2002. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides:

> Amendment XIV
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case is an appeal from a criminal conviction of two counts of racketeering. Robert Herrera was sentenced to two concurrent life terms, followed by two concurrent five-year

terms of supervised release. The conviction was unconstitutionally obtained because the court permitted the prosecutor to use impermissibly discriminatory jury strikes, despite the defendant's *Batson* challenge to those strikes.

The district court exercised jurisdiction under 18 U.S.C. § 3231 as this case was a prosecution of alleged offenses against the laws of the United States. The United States Court of Appeals heard the case as a direct appeal from a final decision of the United States District Court for the Western District of Texas, exercising jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

A two-count superseding indictment, returned in the San Antonio Division of the Western District of Texas on November 19, 1998 charged Herrera and 15 others with racketeering and conspiracy to conduct racketeering. Specifically, the defendants were charged with membership in an alleged criminal organization called the "Mexican Mafia" that was centered primarily in San Antonio, Texas. According to the indictment, the Mexican Mafia engaged in extortion, retaliation, robbery, assault, narcotics trafficking, and murder. The indictment charged specific acts in furtherance of a criminal enterprise and overt acts in furtherance of a conspiracy to engage in a criminal enterprise.

The indictment alleged that Herrera was a "captain" in the Mexican Mafia. As a "captain" Herrera allegedly answered to Robert Perez, who was alleged to be the "General" responsible for the San Antonio area. Herrera was implicated in fewer than half of the acts alleged to underlie the racketeering indictment and fewer than a third of the overt acts in furtherance of the conspiracy indictment.

At the end of voir dire, the government exercised eight of its eleven peremptory strikes on Hispanic veniremembers. (App. D.) Those members were Saldana, Villasenor, Sanchez, Graf, De La O, Lara, Castillo and Flores. *Id.* The defendants challenged the prosecution's use of peremptory strikes as discriminatory and in violation of the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986).

During the discussion that followed, the court first recognized that the eight venirepersons in question were Hispanic. (App. D.) Although defense counsel repeatedly attempted to obtain the prosecution's notes of voir dire to test the reasons given for the strikes, the trial court denied the motion. *Id.* The prosecution offered its explanations for the strikes of the seven veniremembers who were not double strikes: Mr. Graf owned a bar; Mr. Flores worked as a psychologist with children; Mr. De La O had a very strong accent; Ms. Saldana's son was accused of a crime; Ms. Villasenor was divorced; Mr. Lara recognized that at the beginning of the trial there were only allegations; and Mr. Castillo thought that the police had fudged a report. *Id.* The trial court, nevertheless, overruled the *Batson* challenge, evidently persuaded by the prosecution's attempt to explain the strikes. The twelve-member jury that convicted Herrera was composed of eight white members and four Hispanics.

Trial commenced on January 11, 1999 and continued until March 3, 1999. At the conclusion of the trial, Herrera and the other eight remaining defendants were found guilty on counts one and two of the Indictment. (App. C.). Herrera received two concurrent life sentences followed by two concurrent five-year terms of supervised release. Herrera timely appealed his conviction to the United States Court of Appeals for the Fifth Circuit, which affirmed in an unpublished opinion.

REASONS FOR GRANTING THE PETITION

In *Hernandez v. New York*, 500 U.S. 352, 372, 114 L.Ed.2d 495, 111 S.Ct. 1859 (1991), this honorable Court stated:

> Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face quite a different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish speaking jurors. It may well be, for certain ethnic groups in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under the equal protection analysis. . . . And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But this case is not before us.

As indicated by the words cited above, this Court has recognized the equal protection threat posed by a prosecutor who exercises peremptory challenges based on a juror's ability to speak a particular language, in that such a

challenge could in fact be race-based. And while, in the Court's opinion, the facts in *Hernandez* did not warrant a finding that the peremptory challenges used by the prosecutor were exercised in a manner that violated *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), the facts presented in this case warrant such a finding. The hypothetical case referenced in *Hernandez* is now before the Court, as the trial court in this case committed clear error by accepting the prosecutor's pretextual explanation for striking a Hispanic juror based predominantly on his strong accent.

ARGUMENT

ISSUE ONE. The trial court's acceptance of the prosecution's pretextual excuses for striking Hispanic jurors violated Herrera's constitutional rights.

A. The Trial Court's Decision Is Reviewed for Clear Error.

Striking a juror on the basis of race, including Hispanic ethnicity, violates *Batson v. Kentucky*, 476 U.S. 79 (1986). *See United States v. Munoz*, 15 F.3d 395, 399 (5th Cir. 1994) (citing *Hernandez v. New York*, 500 U.S. 352 (1991)). If the prosecutor articulates a race-neutral explanation for the challenged strike, the district court's decision to credit the explanation is reviewed for clear error. *Munoz*, 15 F.3d at 399.

B. The Trial Court's Determination that the Prosecution's Explanation Was Race-Neutral Was Clearly Erroneous.

Batson generally requires a three-step process: 1) the opponent of the peremptory challenge must make out a prima facie case of racial discrimination; 2) the proponent of

the challenge comes forward with a race-neutral explanation of the challenged strike; and 3) the trial court must determine whether the opponent of the strike has proved purposeful racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). In the instant case, parts 2 and 3 of the process involved error.[1] First, the prosecution failed to provide a race-neutral explanation for at least one of the strikes. Second, the trial court committed clear error in crediting the explanation given as to that strike.

1. The prosecution did not offer a race-neutral explanation for striking Mr. De La O.

All of the defendants tried in this case were Hispanic. (App. D.) Of the prosecution's given eleven peremptory strikes, eight were used to strike Hispanic jurors. A timely *Batson* challenge was made, and the district court asked the prosecutor for an explanation. One of those explanations was not race-neutral. Specifically, when the court asked the prosecution why he had struck Mr. De La O, the following exchange occurred:

> MR BAUMANN [for the United States Government]: Your Honor, the Government believed that *Mr. De La O had a very, very strong accent*, and might have a difficult time

---

[1] "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991); a trial judge's request for an explanation of peremptory strikes moots on appeal the question of whether a prima facie case of discrimination was established. *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1999).

> understanding and communicating with other jurors on the panel. The fact that he was single, the nature of his employment, we believe also contributed to our decision.
>
> THE COURT: The nature of his employment as a teacher?
>
> MR. BAUMANN: Special ed teacher, Your Honor. Might make him an inappropriate choice in this particular case, considering the nature of the evidence in the case.
>
> MR. MCCARTHY [for Jesse Gomez]: Your Honor --
>
> MR. BAUMANN: We were predominantly concerned with his very strong accent and difficulty communicating.

(App. D, emphasis added.) Mr. Baumann did not offer a race-neutral explanation for his strike. Instead, Mr. Baumann relied primarily on the "very very strong" accent of the veniremember, emphasizing that his predominant concern was the accent. The prosecution's objection to Mr. De La O's accent was nothing more than a pretext for an objection to his ethnicity.

In *Hernandez v. New York*, 500 U.S. 352, 363 (1991), this Court recognized the danger that an excuse based on a juror's ability to speak a particular language could be in fact race-based. The Court found that especially in a community in which a significant percentage of the Latino population speaks fluent Spanish, the ability to speak Spanish can be viewed as a proxy for race. In such circumstances, the Court found that language ability cannot by itself form a race-neutral basis for striking a juror. *Id.* The Court found that "a

policy of striking all who speak a given language, without regard to the particular circumstances of the trial . . . may be found by the trial judge to be a pretext for racial discrimination." *Id.* at 371-72.

In this case, the explanation for the strike was not the prospective juror's ability to speak Spanish, but his accent. The prosecution purported to be concerned with his ability to understand other jurors and to communicate. But, there was no question that Mr. De La O spoke English. According to the reasoning in *Hernandez* discussed above, the prosecutor's purported concern with his ability to communicate was not a race-neutral explanation for the strike. Instead, the explanation clearly revealed the prosecutor's discriminatory intent. *See Purkett*, 514 U.S. at 768 ("[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.") The faulty logic employed by the prosecutor further reveals the prosecutor's discriminatory intent and establishes that the challenge allegedly based on Mr. De La O's accent was a pretext for a race-based challenge. The prosecutor, in explaining his reasons for challenging Mr. De La O, makes the illogical argument that Mr. De La O would have a difficult time understanding and communicating because of his very strong accent. *See U.S. v. Alcantar*, 897 F.2d 436, 439 (9th Cir. 1990) (noting "the logical flaw in the argument that because a person has a foreign accent that makes it difficult to understand them that it follows that they have trouble understanding English"); *People v. Morales*, 719 N.E.2d 261, 271 (Ill. Ct. App. 1999) (stating that "it is unclear how a venireperson's accent is related to his or her ability to understand trial testimony").

Furthermore, if the prosecutor's allegation that Mr. De La O's very strong accent would have rendered him unable to communicate and understand, the prosecutor should have

more appropriately raised this allegation to support a challenge for cause against Mr. De La O. *See Hernandez v. New York*, 500 U.S. 352, 379 (1991) (Stevens, J. dissenting) (stating that if the prosecutor's concern was valid, it should have been raised in a challenge for cause rather than a peremptory challenge). But the prosecutor never raised his concerns regarding Mr. De La O's accent and never asserted that Mr. De La O's accent would have adversely affected his ability to communicate and understand when for cause challenges were being discussed. Because the prosecutor did not make any for cause challenge against Mr. De La O on these grounds, he should not have been permitted to advance this reason as a justification for the peremptory challenge. *Id.*; *see also* 28 U.S. C. § 1865(b)(2)-(3) (stating that English proficiency is a requirement for serving on a jury). If the prosecutor's concerns were valid, they would have been the proper subject of a for-cause challenge. While asserting a justification to support a peremptory challenge that could also support a cause challenge does not conclusively establish that the reason was not a race-neutral explanation, under these circumstances, it is supportive of such a finding.

Finally, several courts have stated that exercising a peremptory challenge against a venireman on the basis of an accent raises an inference that the challenge was not race-neutral and that the reason may be a pretext. *See State v. Gonzalez*, 53 A.2d 210, 216 (Conn. 1988) (noting that the prosecutor's focus on a juror's accent "raises the spectre of an illicit motive at work"); *People v. Garcia*, 620 N.Y.S.2d 237, 246 (Supreme Court, Bronx County, New York 1994) (considering as evidence of discriminatory intent the fact that a lawyer did not raise the issue of a juror's accent and English proficiency by asserting a for-cause challenge but instead waited to exercise a peremptory challenge on these grounds).

Because the prosecution did not offer a race-neutral explanation for its strike of Mr. De La O, and in fact offered a specific race-based explanation, the trial court erred in rejecting the defense counsel's timely *Batson* challenge to the prosecution's jury strikes. This Court should reverse the trial court's verdict and remand the case for a new trial before a properly selected jury.

2. Even if the prosecution's explanation regarding Mr. De La O was race-neutral, the trial court clearly erred in accepting it.

In evaluating the explanation for a given jury strike, the district court should determine whether the explanation was race-neutral, was tied to the particular circumstances of the case and was not pretextual. *See Munoz*, 15 F.3d at 399. As set forth above, the explanation here was not race-neutral, but it also was not tied to the particular circumstances of the case, and it was a pretext.

The prosecution argued that it struck Mr. De La O because it was concerned with his ability to communicate. However, in the exchange that took place between Mr. De La O and the court during voir dire, Mr. De La O appeared to make himself fully understood:

> THE COURT: Mr. De La O? How are you doing this afternoon?
>
> PROSPECTIVE JUROR: Fine.
>
> THE COURT: Do you remember hearing something about this case before we came to court, seeing anything on TV or reading something in the paper?

PROSPECTIVE JUROR: No, not really. I was watching the news last night and when it came on television, I walked out of the room for some reason, so I didn't.

THE COURT: You didn't catch it? Did you ever hear of some alleged group out there called the Mexican Mafia?

PROSPECTIVE JUROR: Last time I heard it, it didn't stay in my mind at all.

THE COURT: What do you remember hearing about any type of group that might be out there that's called "the Mexican Mafia"?

PROSPECTIVE JUROR: Just not nothing really, that stayed in my mind.

THE COURT: Anything about what you heard in the past that could affect you if you were a juror in this case?

PROSPECTIVE JUROR: No, sir.

THE COURT: Can you presume each one of these guys not guilty and vote not guilty, unless the Government can prove to you that they're guilty?

PROSPECTIVE JUROR: I think so.

THE COURT: Okay. And you won't be affected by anything that you heard before you came to court today?

PROSPECTIVE JUROR: No, none at all.

THE COURT: Thank you.

PROSPECTIVE JUROR: That's it?

(App. D.) This transcript provides no indication that the district court, counsel or the court reporter had any trouble understanding Mr. De La O.

The Fifth Circuit has recognized that "in certain, or even most, situations in Texas striking on [the basis of Spanish language ability] would be . . . a pretext for prohibited striking for ethnicity." *Munoz*, 15 F.3d at 399. In *Munoz*, the court of appeals provided an exception to that general rule – when the prosecution expressed a concern that Spanish speakers would not accept official translations of Spanish. *Id.* That exception is not applicable in this case. The prosecution was not concerned with jurors translating on their own. Thus, this is among the situations in which the prospective juror's language ability was in no way tied to the particular circumstances of the trial, and it was nothing more than a proxy for his race.

An Illinois Court of Appeals has recently addressed whether or not exercising a peremptory challenge against a juror solely on the basis of an alleged accent is pretextual. *See People v. Morales*, 719 N.E.2d 261, 270 (Ill. Ct. App. 1999). In *Morales*, the prosecutor used a peremptory challenge to strike a Hispanic venireperson. *Id.* At the *Batson* hearing, the prosecutor supported his peremptory challenge by arguing that the juror had a heavy accent and potentially a language problem. *Id.* But the Illinois Court of Appeals found that the reasons proffered by the prosecutor were pretextual and that the juror was challenged because he was Hispanic. *Id.* at 271. The court noted that the record of voir dire did not support the state's explanation because the judge had asked the juror over 30 different questions concerning many different topics and at no point was the

juror unresponsive, unintelligible, or otherwise unable to understand the questions being posed to him. *Id.* at 270-271. The court stated:

> "[T]here is a conflict in the state's explanation. If the prosecutors really challenged [the juror] because he had trouble understanding English, there is no evidence in the record to support this conclusion. But if the state struck [the juror] from the venire because he had a Spanish accent, then we can only conclude that he was challenged because he was Hispanic."

Id.

As in *Morales*, the prosecutor's implication that Mr. De La O might have difficulty understanding or communicating during the proceedings is not supported by the record. The record reveals that Mr. De La O was competent in the English language and was able to express himself, engage in dialog, communicate with the trial court and understand the questions being posed to him, despite the prosecutor's allegations that Mr. De La O's accent affected his ability to communicate and understand. Mr. De La O was struck on the basis of his Hispanic accent, a proxy for race. The peremptory challenge and supporting explanation offered by the prosecutor was not race neutral; rather, the explanation proffered by he prosecutor was a pretext and was not tied to the particular circumstances of the case. Thus, the trial court committed a clear error in accepting the prosecution's explanation for its strike of Mr. De La O.

CONCLUSION

This Court has previously held that proficiency in a particular language should in some circumstances be treated as a surrogate for race under the equal protection analysis.

Hernandez v. New York, 500 U.S. at 372. This case presents exactly that situation because the prosecutor's reference to Mr. De La O's "strong accent" was a reference to the fact that Mr. De La O was not a native English speaker. Accordingly, the prosecution's explanation for its preemptory strike was not race-neutral, and Robert Herrera's right to equal protection under the law was violated.

For these reasons, this Court should grant certiorari, reverse the court of appeals, and remand the case to the trial court for a new trial.

Respectfully submitted

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Dated: February 6, 2003

APPENDIX

APPENDIX

A. Unpublished Opinion of the United States Court of Appeals for the Fifth Circuit, No. 99-50279; *United States of America v. Jesse "Chango" Gomez, Jr., also known as Changito Gomez; Pete Carrion; Remigio "Tito" Gomez; Robert "Robe" Herrera, also known as Rove Herrera, Jr.; Juan "Jon Jon" Johns; Martin "Pancake" Ortegon; Robert "Beaver" Perez; Victor "Tito" Pena; Michael Perez; Louis "Big Lou" Morales* (On Appeal from the United States District Court for the Western District of Texas (SA-98-CR-265-6))

B. Order Denying Rehearing

C. Verdict in Cause No. SA-98-CR-265-6

D. Portion of Transcript Concerning Mr. De La O and *Batson* Challenge

E. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50279

U.S. COURT OF APPEALS
FILED
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CHARLES R. FULBRUGE
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UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

JESSE "CHANGO" GOMEZ, JR. also known as Changito Gomez; PETE CARRION; REMIGIO "TITO" GOMEZ; ROBERT "ROBE" HERRERA, also known as Rove Herrera, Jr.; JUAN "JON JON" JOHNS; MARTIN "PANCAKE" ORTEGON; ROBERT "BEAVER" PEREZ; VICTOR "TITO" PENA; MICHAEL PEREZ; LOUIS "BIG LOU" MORALES, Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(SA-98-CR-265-6)

Before JOLLY, DUHE, and DENNIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[1]

This appeal arises from convictions of drug traffickers alleged to be members of the "Texas Mexican Mafia." The record is replete with evidence of murders, extortion, drug dealing and robberies. Jesse Gomez, Jr., Pete Carrion, Remigio Gomez, Robert Herrera, Juan Johns, Martin Ortegon, Robert Perez, Victor Pena, Michael Perez, and Louis Morales ("Appellants") were convicted of racketeering and racketeering conspiracy. Each was sentenced to life imprisonment. They appeal their convictions and sentences on numerous grounds. Finding no reversible error, we AFFIRM.

I

Appellants were indicted, along with six other individuals, for racketeering and racketeering conspiracy, in violation of 18 U.S.C. § 1962(c) and (d). The indictment alleged 22 racketeering acts, including 15 murders, two attempted murders, two robberies, and possession with intent to distribute marijuana, cocaine, and heroin; and 35 overt acts in furtherance of the racketeering conspiracy. Appellants were alleged to be members of the Texas Mexican Mafia, headquartered in San Antonio. The Mexican Mafia had a written constitution that described its purposes and activities, which expressly included drug dealing, assassination, prostitution, "robberies of the highest degree," gambling, extortion, weapons, "or any and every other thing criminally imaginable."

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Robert Perez, the "General," allegedly carried out the wishes of unindicted co-conspirator Huerta, the President of the Mexican Mafia, who was in prison throughout the time of the alleged racketeering activity. The remaining Appellants were alleged to have held the following positions in the Mexican Mafia: Herrera was a Captain; Morales and Ortegon were Lieutenants; Jesse and Remigio Gomez and Johns were Sergeants; and Pena, Michael Perez, and Carrion were Soldiers.

Five of the persons indicted pleaded guilty before trial, and one during trial. The ten remaining defendants (Appellants) were convicted of both counts after a six-week trial. All were sentenced to concurrent life terms on each count.

II

Appellants raise the following issues on appeal: (1) the district court clearly erred in rejecting their challenge to the Government's strike of a prospective juror; (2) the district court abused its discretion by denying defense motions for severance; (3) the district court abused its discretion by denying defense motions for transfer of venue and a hearing on the motions; (4) the district court abused its discretion by admitting gang expert testimony that did not satisfy *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); (5) the district court committed plain error by instructing the jury that the Government need only show a minimal effect on interstate commerce; (6) the evidence is insufficient to prove that the defendants participated in a pattern of racketeering activity and conspired to do so, and to prove venue and the requisite effect on interstate commerce; (7) their convictions must be reversed because of violations of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Jencks Act, 18 U.S.C.

§ 3500; (8) the district court abused its discretion by not submitting a special verdict form; (9) the district court committed plain sentencing error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and (10) the district court abused its discretion by denying Ortegon a hearing on his motion for a new trial.[2] With the exception of the first issue listed above, the remaining issues are without merit and we shall dispose of them with very little discussion.

A

Peremptory Strike

Appellants objected to the Government's peremptory strike of Hispanic veniremember De La O.[3] When asked to explain the reason for the strike, the prosecutor stated that De La O had a very strong accent and the Government was concerned about his ability to communicate with other jurors, as well as the facts that he is single and is a special education teacher. The Government's sworn written response stated that four persons seated at the Government's counsel table believed that De La O and the court had difficulty communicating during voir dire, and that the prosecution believed that, as a special education teacher, De La O would be particularly sensitive and sympathetic to the circumstances of the defendants. The district court, after

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[2] Appellants each adopt most of the issues raised by the others.

[3] Appellants also objected to other peremptory challenges by the Government, but the only strike they raise on appeal is that of De La O. Remigio Gomez adopts this issue despite the fact that his counsel expressly opted out of the objection at trial; he claims ineffective assistance of counsel.

reviewing the Government's written reasons, accepted them as race-neutral, stating:

> The Court has reviewed the reasons given by the Government as to the challenges, the written responses of the Government. The court is sensitive to this matter, my parents telling me that they are Hispanic and that more likely that might make me one as well, the Court is extra sensitive to that issue. The Court recalls the questions that the Court itself asked and responses, and the Court is satisfied the reasons given by the Government are not based on any racial grounds, but were legitimate reasons for striking these individuals and will deny the Defense motion with regard to those five strikes that were made by the Government as to five gentlemen that appear to be of Latino or Hispanic descent.

The jury was composed of eight whites and four Hispanics.

Appellants argue that the prosecutor's reasons for striking De La O are not race-neutral, because his Spanish accent is intrinsically intertwined with his Hispanic ethnicity and thus should be viewed as a surrogate for his ethnicity. They argue that the Government's reliance on his accent is a pretext for discrimination, because De La O did not have any difficulty in understanding the questions asked by the judge or communicating his answers during voir dire, and he was a trained professional educator who spoke fluent English. They observe that the Government did not strike four unmarried jurors, one of whom is also a teacher.

We review the district court's determination that the Government did not engage in purposeful discrimination under the clearly erroneous standard. *E.g., United States v. Pofahl*, 990 F.2d 1456, 1466 (5th Cir. 1993). "Unless a discriminatory intent is inherent in the prosecutor's

explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 357 (1991). Great deference is given to the district court's finding, because it is based primarily on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Id.* at 365.

The Ninth Circuit recently addressed a similar situation in *United States v. Murillo*, 288 F.3d 1126, 1135-37 (9th Cir. 2002), petition for cert. filed (Jul. 24, 2002) (No. 02-5778). In that case, the defendant, a Filipino, challenged the prosecution's exercise of a peremptory strike of a Filipino prospective juror. *Id.* at 1135. The prosecutor offered the following reasons for the strike: the prospective juror's background as a casino employee, her statement that she had never read a book, her statement that her favorite television show was "Judge Judy," and her difficulty in communicating. *Id.* The Ninth Circuit stated that "the various reasons offered by the prosecution did not inherently suggest a discriminatory intent, and indeed, were race-neutral." *Id.* at 1136. The court rejected the defendant's contention that "difficulty communicating implies an inherent discriminatory intent," noting that it had previously held that "'[s]o long as the prosecutor . . . can convince the district court that the potential juror who is being struck in fact has difficulty with English, the justification is race-neutral.'" *Id.* (brackets and italics in original; quoting *United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993)).

We agree with the Ninth Circuit's observations regarding the deference that an appellate court must give to the district court's factual determination when ruling on the credibility of a prosecutor's strike based on a juror's difficulty in communicating:

> The trial judge is in a unique position to determine whether a witness has difficulty communicating, and therefore we grant a high level of deference to the district court's finding on this point. It is difficult to ascertain from a transcript the level of a juror's command of spoken English. . . . How slowly she spoke, whether she hesitated, how thick her accent was, and what her body language revealed are not recorded in a transcript, yet these are aspects of communication that may be considered by the trial judge.

Id. In this case, giving due deference to the district court's opportunity to hear and observe both the prosecutor and De La O, we cannot conclude that the district court clearly erred in finding that the Government's reasons for peremptorily striking of De La O were not pretextual. The Government did not strike De La O because he had a Spanish accent. Instead, the strike was based on the prosecutors' asserted belief that his heavy accent would cause communication difficulties with other jurors during deliberations. This reason is ethnically-neutral. The district court observed the prosecutor's demeanor. It listened to De La O during voir dire. It was therefore in the best position to determine the credibility of the prosecutor's explanation and to make the ultimate finding as to whether the prosecutor's reasons for striking De La O were pretextual.[4] We will not disturb its ruling.

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[4] We find no abuse of discretion by the district court in refusing to permit Appellants' counsel to cross-examine the prosecutor or look at the prosecutor's voir dire notes. *See United States v. Clemons*, 941 F.2d 321, 323 (5th Cir. 1991) (district court has discretion to formulate

B

Severance

Ortegon, Carrion, Michael Perez, and Morales argue that the district court erred by denying their motions for severance. They maintain that they were prejudiced by the spillover effect of the evidence of their co-defendants' violent crimes (especially the "French Place" murders, described as one of the worst mass murders in recent San Antonio history) and drug dealing. Furthermore, they argue, the district court's instructions to the jury to consider the evidence against each defendant separately were inadequate to ameliorate the prejudice.

The Government responds that the alleged prejudicial evidence would have also been admissible in separate trials to show the existence of the enterprise, overt acts, motives for the murders with which they were involved, and the position of trust they held in the organization. The Government also notes that the district court allowed the jurors to take notes to assist them in keeping the evidence against each defendant separate. Furthermore, the Government points out that defense counsel argued in closing that the jury should consider the evidence against each defendant separately.

We find no abuse of discretion. Appellants have not shown any ground for disregarding the presumption that the jurors followed the district court's instructions to consider the evidence against each defendant separately. *See United*

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procedure for testing prosecutor's reasons, and has discretion to limit scope and duration of inquiry).

States v. Cihak, 137 F.3d 252, 259 (5th Cir. 1998) (jury is presumed able to follow instructions to consider evidence against each defendant separately).

C

Transfer of Venue

Appellants argue that the district court abused its discretion by denying defense motions for transfer of venue and a hearing on their motions. They maintain that they were denied a fair trial in San Antonio because of pervasive, prejudicial pretrial publicity. In support of their motions, they presented 69 broadcast summaries from San Antonio television stations, newspaper articles, and a transcript from a state court venue proceeding, including expert testimony about the saturation of media coverage. They note that the publicity occurred within close proximity to the trial; that it contained inflammatory accounts of the crimes, characterizing the defendants as blood-thirsty and describing the French Place murders as a slaughter, bloodbath, execution, and the worst mass murder in recent San Antonio history; and that it included matters inadmissible in evidence, such as the anticipated sentences, the guilty pleas of co-defendants, and the statement by one defense attorney that the other defendants were probably guilty.

Prejudice will be presumed if the defendant establishes that it is virtually impossible to obtain an impartial jury because prejudicial, inflammatory publicity about the case has saturated the community from which the jury is drawn. *United States v. Parker*, 877 F.2d 327, 330-31 (5th Cir. 1989). The Government may rebut the presumption of prejudice by demonstrating that voir dire resulted in the impaneling of an impartial jury. *Id.* at 331. Alternatively, a defendant may obtain relief if he establishes that pretrial publicity created a significant possibility of prejudice and

that the voir dire procedure failed to provide a reasonable assurance that prejudice would be discovered. *United States v. Beckner*, 69 F.3d 1290, 1292 (5th Cir. 1995). The defendant is entitled to an evidentiary hearing when the allegations are "sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented." *United States v. Smith-Bowman*, 76 F.3d 634, 637 (5th Cir. 1996) (internal quotation marks and citation omitted).

Appellants argue that they have established presumptive prejudice. Alternatively, they contend that they demonstrated a significant possibility of prejudice. They note that 85 percent of the prospective jurors admitted that they had been exposed to pretrial publicity; a majority of those had heard about the trial and the French Place murders within the week preceding the trial; and 11 of the 12 jurors selected said that they had been exposed to pretrial publicity concerning the trial, the Mexican Mafia, and the French Place murders. As proof of the inadequacy of the voir dire procedure, they observe that the court did not allow questioning by counsel or the use of a jury questionnaire. They also point out that, prior to the jury being sworn, one of the jurors who had been selected approached the district court and said that she could not be fair because she had been influenced negatively by pretrial publicity. (She was excused.)

Although the question may be close, we conclude that there was no abuse of discretion. Even assuming that Appellants established presumptive prejudice, the presumption was rebutted by the selection of a fair jury. The district court first questioned the venire as a group, and excused those who said that they might be affected by pretrial publicity. It then questioned each remaining veniremember individually, excusing for cause all who

indicated that they might have been affected. All of the jurors selected indicated that they had not been affected by the publicity; and all jurors stated that they would accord the presumption of innocence to all of the defendants. Contrary to the Appellants' argument, that one of the jurors approached the district court and said that she could not be fair demonstrates the effectiveness of the voir dire procedure in revealing prejudice.

D

Admission of Testimony About Gangs

Appellants argue that their convictions must be reversed because the district court admitted gang expert testimony that did not satisfy the requirements of *Daubert*. They argue that the expert was unable to point to any peer-reviewed articles or other literature in the field and had no formal education in gang-related activities. The Government asks us to strike this argument because Appellants do not specify what testimony they believe was admitted in error or how it prejudiced them. The Government notes that the witness, a San Antonio Police Department detective with 31 years of experience, testified on a variety of subjects, including the activities and purposes of the Mexican Mafia, and he offered a translation of correspondence between Mexican Mafia members about Mexican Mafia activities. The Government did not offer the witness as an expert, and it argues that most of his testimony was factual and dealt with information he had learned in his capacity as a law enforcement officer. To the extent he expressed any opinions, the Government argues that they are admissible as lay opinions under Federal Rule of Evidence 701, because they are based on personal knowledge of the facts. Alternatively, the Government argues that any error is harmless because the witness would have qualified as an expert witness under Federal Rule of

Evidence 702 and, in any event, his testimony was cumulative.

We find no abuse of discretion by the district court. Even assuming this issue was adequately briefed (which is marginal), and further assuming that the testimony was admitted erroneously, Appellants have not demonstrated that their substantial rights were affected. *See* FED. R. EVID. 103(a).

E

Jury Instructions

Appellants argue that the district court erred by instructing the jury that the Government need only show a minimal effect on interstate commerce. They maintain that the Government was required to demonstrate that their activities had a substantial effect on interstate commerce. The Government notes that none of the Appellants objected to the instruction, none of them submitted proposed instructions requiring the jury to find a substantial effect on interstate commerce, and two of them (Remigio Gomez and Robert Perez) proposed instructions requiring only a minimal effect and thus invited the error of which they complain. *See United States v. Baytank (Houston). Inc.*, 934 F.2d 599, 606-07 (5th Cir. 1991). The Government contends that even if there was an error, it was not plain and, in any event, it was harmless because the evidence shows a substantial effect on interstate commerce.

Five circuits have held that it is not necessary to show that a RICO enterprise's effect on interstate commerce is

substantial.[5] Neither the Supreme Court nor our court has decided this issue. *See United States v. Robertson*, 514 U.S. 669, 670-72 (1995) (leaving open question whether RICO enterprise's activities must "substantially affect" interstate commerce where enterprise was engaged in commerce). Under the circumstances of this case, we need not decide whether the instruction was erroneous, because even assuming that it was, any error would not be plain given the unsettled state of the law both in the Supreme Court and in this circuit, and the overwhelming evidence of drug trafficking involved in this RICO enterprise. Accordingly, we hold that the district court did not commit plain error by

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[5] *United States v. Marino*, 277 F.3d 11, 34-35 (1st Cir.) (rejecting contention that government was required to show that enterprise's activity had a substantial effect on interstate commerce and approving instruction that "[t]he evidence need not show any particular degree of or effect on interstate commerce. All that is required is some effect on interstate commerce."), *cert. denied*, 122 S.Ct. 2639 (2002); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir.) ("de minimis connection suffices for a RICO enterprise that 'affects' interstate commerce"), *cert. denied*, 122 S.Ct. 292 (2001); *United States v. Juvenile Male*, 118 F.3d 1344, 1348 (9th Cir. 1997) ("all that is required to establish federal jurisdiction in a RICO prosecution is a showing that the individual predicate racketeering acts have a de minimis impact on interstate commerce"); *United States v. Miller*, 116 F.3d 641, 673-74 (2d Cir. 1997) (approving instructions in RICO case that effect of enterprise's activities on interstate commerce does not need to be substantial and that a minimal effect is sufficient); *United States v. White*, 116 F.3d 903, 926 & n.8 (D.C. Cir. 1997) (approving instruction that "evidence need not show any particular degree of effect on interstate commerce" and explaining that, because RICO enterprise was engaged in drug trafficking, there was a substantial effect on or relation to commerce; therefore, fact that district court did not require jury to find that conspiracy affected interstate commerce to any particular degree was irrelevant).

instructing the jury that the Government need prove only a minimal effect on interstate commerce.

F

Sufficiency of the Evidence

Appellants contend that the Government presented insufficient evidence that they participated in a pattern of racketeering activity and conspired to do so, and to prove venue and the requisite effect on interstate commerce. We address each of these contentions separately. We note at the outset, however, that Appellants' insufficient evidence arguments are based largely on challenges to the credibility of Mexican Mafia members who testified against them. They argue that the testimony of admitted psychotic, hallucinogenic, and drug-addicted co-defendants (Estrada, Carrasco, and Torres) who were seeking entry into the federal witness protection program was not credible. We reject these challenges to the credibility of the Government's witnesses. "It is well settled that credibility determinations are the sole province of the jury." *United States v. Cathey*, 25 F.3d 365, 368 (5th Cir. 2001). "The jury has responsibility for determining the weight and credibility of testimony and evidence, even from coconspirators." *United States v. Green*, 293 F.3d 886, 895 (5th Cir. 2002)

1

Pattern of Racketeering Activity

Appellants argue that the evidence is insufficient to prove that they engaged in a pattern of racketeering activity, because the evidence of the predicate racketeering acts is insufficient. We consider each challenged predicate act separately.

a

Ortegon: Possession with Intent to Distribute Cocaine

We reject Ortegon's contention that the evidence was insufficient to prove that he possessed cocaine with the intent to distribute it. A bag full of cocaine, as well as plastic bags used to package cocaine, were found in a car driven by Herrera, under the passenger seat occupied by Ortegon, who had a fully loaded revolver tucked in his waistband. Ortegon argues that the evidence was insufficient to prove that he knew the cocaine was under his seat. He notes that Herrera pleaded guilty to possession of the cocaine in state court, while the charges against him were dismissed. In the light of other evidence that Ortegon was a drug dealer and a gang leader, the jury reasonably could have concluded that Ortegon knew the cocaine was present and was armed to protect it.

b

Ortegon: Murder of Peralez

Ortegon also argues that the evidence was insufficient to prove his involvement in the murder of Peralez. Former Mexican Mafia member Estrada testified that Appellant Herrera ordered him and Ortegon to murder Peralez; and that, on a signal from Herrera, he (Estrada) shot Peralez, but Ortegon did not fire his weapon. Ortegon argues that Estrada's testimony is not credible. We conclude that the evidence was sufficient to find Ortegon guilty of murder under the law of the parties, on which the jury was instructed. Estrada's admission that he was the only one who shot Peralez lends credibility to his testimony that Ortegon was with him. In any event, such credibility determinations are for the jury, not this court, to make.

c

Ortegon and Michael Perez: Murder of Adames

Ortegon and Michael Perez contest the sufficiency of the evidence offered by the Government to prove that they were guilty of the murder of Adames.

Estrada testified: Michael Perez and Ortegon were present at a meeting at Robert Perez's house during which the murder of Adames was planned; Michael Perez drove the car to the scene and blocked Adames's means of escape; Ortegon got out of the car with a gun; Estrada shot Adames and heard a lot of other gunshots; and after the shooting, Michael Perez drove the shooters to a truck, where they unloaded their weapons. Carrasco, who was also present, testified that everyone (Herrera, Ortegon, Estrada and himself) except Michael Perez got out of the car and shot at Adames. The medical examiner found that Adames had been shot 11 times with three different weapons. Ortegon and Michael Perez argue that Carrasco and Estrada were not credible witnesses, inasmuch as they were drug addicts testifying in exchange for leniency. In addition, Michael Perez relies on defense witness Sanchez's testimony that Michael Valdez, not Michael Perez, was the driver of the car involved in the Adames murder. He also notes that the Government substituted his name for that of Michael Valdez in a search warrant only after he refused to cooperate against his uncle (Appellant Robert Perez).

We conclude that the evidence was sufficient to convict Ortegon and Michael Perez under the law of the parties, as to which the jury was instructed. We repeat: Decisions about the credibility of witnesses are for the jury.

d

Ortegon and Michael Perez: Murder of Ybarra

Ortegon and Michael Perez also challenge the sufficiency of the evidence that they murdered Ybarra. They assert that Estrada's and Carrasco's testimony that Ortegon shot Ybarra, and that Michael Perez drove the car to and from the murder scene, is not credible.

The jury was entitled to determine the credibility of Estrada's and Carrasco's testimony. In addition to their testimony, the Government presented other corroborating evidence, including the in-court identification of Ortegon as the shooter by eyewitness Marco Gonzalez. The Government also presented evidence that Michael Perez was present at the meeting when the murder was planned; that he drove the vehicle to the scene of the murder; and that, after the shooting, he drove the shooters to a truck, where they unloaded their weapons.

e

Carrion and Morales: Possession with Intent to Distribute Marijuana

Carrion and Morales argue that the evidence was insufficient to prove that they possessed marijuana with the intent to distribute it. Former Mexican Mafia member Jesse Torres testified: he saw 50 pounds of marijuana at Morales's mother's home; Morales, Carrion, and Escalante had been told by Robert Perez to steal the marijuana from someone; after they stole the marijuana, someone else called Robert Perez to have him come pick it up; when Robert Perez arrived at Morales's mother's house, Morales, Carrion, and Escalante were weighing and dividing it; Robert Perez gave each of them a pound and then sold the rest to someone in

Houston. Carrion and Morales argue that this evidence is insufficient because Torres was a liar and heroin addict and thus his testimony was not credible. We reject that contention. It was up to the jury whether to believe Torres's testimony.

f

Carrion and Morales: Murder of De Los Santos

Carrion and Morales challenge the sufficiency of the evidence offered to prove their participation in the murder of De Los Santos.

Munoz testified: he instructed Flores to have his crew kill De Los Santos because he was talking to outsiders about the French Place murders; Munoz drove De Los Santos to a bar under the guise of having him assist Morales and Carrion with a hijacking; Carrion's rental car was parked outside the bar and Morales and Carrion were inside; he left the bar five-ten minutes later, leaving De Los Santos with Morales and Carrion; later, Flores told him that De Los Santos was dead. Munoz admitted that he did not see De Los Santos murdered and did not know who had killed him. Although Munoz testified that he did not see Torres at the bar, Torres testified that he was there, along with Davila and Flores, when Munoz and De Los Santos arrived. Torres testified further that Flores later told him De Los Santos had been killed; and that he later heard Morales bragging about the murder and laughing about how he had choked De Los Santos. The medical examiner testified that the cause of death was most likely a combination of blunt injuries to the head and strangulation, although the injuries that appeared to be caused by strangulation could have been caused by blunt trauma from being hit by a vehicle. The manager of the rental car agency testified that, when Carrion's rental car was

returned, there were no signs of damage consistent with it having hit a person.

Morales and Carrion argue that there is no physical evidence to connect them to the murder; no one saw De Los Santos murdered; and both Munoz and Torres testified that they did not know who killed De Los Santos. Morales notes that Carrion testified at trial that Morales did not kill De Los Santos. For the first time in his reply brief, Morales states that, after trial, Carrion obtained an affidavit in which co-defendant Pena admitted murdering De Los Santos.

Although circumstantial, the evidence was sufficient. Appellants' challenges are based primarily on their contention that the testimony of Munoz and Torres was not credible. We refuse to consider Morales' claim that Pena murdered De Los Santos, raised for the first time in his reply brief. *See United States v. Garcia-Abrego,* 141 F.3d 142, 168 n.14 (5th Cir. 1998)

g

Johns: Attempted Murder of Castillo

Johns contends that the evidence is insufficient to prove that he attempted to murder Castillo. Johns and Castillo were cellmates. Castillo was a member of a different, rival gang. While Castillo was sleeping, Johns stabbed him 22 times in the head and neck with a shank that had a two and one-half inch blade. Castillo fought back and held onto Johns' legs until prison guards arrived. As Castillo held Johns down, Johns said, "If you let me go, ---, I'll stab you again." In a search of the cell after the incident, guards found a torn-up note in the toilet that included the instruction to "hit to kill." Johns argues that the evidence is insufficient to convict him of attempted murder because the evidence does not prove that he intended to kill Castillo or that he

inflicted serious bodily injury on Castillo. He notes that Castillo was able to walk to the infirmary, that none of his stab wounds required sutures, and that there was no evidence that Castillo was in danger of death from his wounds. Johns admits that he used a deadly weapon, and that specific intent to kill may be inferred from such use; but he claims that the manner in which he used the weapon makes it reasonably apparent that he did not intend to cause death or serious bodily injury.

We conclude that the evidence is sufficient to prove that Johns attempted to murder Castillo. The fact that Castillo's struggle prevented Johns from inflicting a fatal wound does not preclude the jury from inferring, based on all of the circumstances, that Johns acted with specific intent to kill. The Government was not required to prove that Johns caused serious bodily injury because that is not an element of attempted murder.

h

Michael Perez: Association with Enterprise and Participation in Its Affairs

Michael Perez argues that the evidence is insufficient to prove that he associated with the enterprise and participated in its affairs. He contends that the Government failed to prove that he was a member of the Mexican Mafia; instead, it showed only a familial relationship with his uncle, Appellant Robert Perez. He argues that there is no evidence that he was employed by or associated with the enterprise or that he intentionally participated in its affairs. Although there was testimony that he was present at meetings at which murders were discussed, and that he drove the murderers to and from the scenes of at least two of the murders, he argues that there is no evidence that he participated in the meetings

or that he was there for any other reason than that he is the nephew of Robert Perez.

We conclude that the evidence is sufficient. Carrasco and Estrada both testified that Michael Perez was a member of the Mexican Mafia. The Government also introduced a photograph of Michael Perez with Mexican Mafia members Herrera, Ortegon, and Carrasco. There was also evidence that he helped clean bullets used in the murders. the jury was entitled to infer that he would not have been allowed to be present at murder-planning meetings and to drive the shooters to and from the scenes of the murders unless he was a member of the Mexican Mafia.

i

Remigio Gomez: Attempted Murder of Grant

Remigio Gomez contends that the evidence is insufficient to prove that he attempted to murder Grant. Mexican Mafia member Tavitas testified that Remigio Gomez shot Grant during a hijacking conducted by a crew led by Appellant Jesse Gomez. Another Mexican Mafia member, Munoz, testified that Jesse Gomez told him that Remigio Gomez shot Grant. Remigio Gomez argues that this evidence is insufficient to prove that he committed attempted murder. He argues that Texas law requires the prosecution to prove that the act was intentional rather than an accident; yet the Government has conceded that he panicked when he shot Grant. He claims that Grant's appearance surprised him, and that he panicked and accidentally discharged the shotgun in Grant's direction when Grant reached out to push the weapon away. He concedes, however, that at trial he presented an identity defense and did not argue that the shooting was an accident. The Government notes that there is no evidence that Grant touched the shotgun or attempted to push it away. It also

notes that the photograph of Grant's wounds does not support the theory that the gun accidentally discharged; instead, it appears that Grant had been pushed down onto his knees and then shot.

We conclude that the evidence is sufficient. As the Government notes, the fact that Remigio Gomez panicked is not relevant to the issue of his intent, and the jury reasonably could have concluded that he intended to kill Grant when he pointed the shotgun at him and pulled the trigger.

2

Racketeering Conspiracy

Appellants' challenges to the sufficiency of evidence of conspiracy are, again, based primarily on their attacks on the credibility of the Government's witnesses. In addition, some of them argue that the Government failed to prove each overt act alleged in the indictment. Finally, some of them argue that their participation in the various overt and predicate racketeering acts is insufficient to prove that they knew of and agreed to the overall objectives of the enterprise.

We conclude that the evidence is sufficient. As stated, credibility choices are for the jury. The Government was not required to prove each overt act alleged in support of the racketeering conspiracy. *See* 18 U.S.C. § 1962(d); *Salinas v. United States*, 522 U.S. 52, 62 (1997) (RICO conspiracy statute, 18 U.S.C. § 1962(d), does not require proof of overt act). There is sufficient evidence to show that each Appellant participated in at least some of the predicate and overt acts. This evidence, together with their membership in the Mexican Mafia, whose written constitution describes the illegal purposes and objectives of the organization, is indeed evidence that they knew of and agreed to the overall objectives of the enterprise.

3

Effect on Interstate Commerce

Appellants contend that the Government presented insufficient evidence that the activities of the enterprise had a substantial effect on interstate commerce. Alternatively, they argue that, even if only a minimal effect on interstate commerce is required, the Government failed to prove any effect. They argue that all of the alleged criminal acts took place in and around San Antonio, and that the evidence of interstate communication (written and telephonic) was, at best, incidental to the operation of the enterprise.[6]

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[6] As we have earlier noted, Appellants did not object to the jury instructions, which required the jury to find only a minimal effect on interstate commerce. In cases in which the Government fails to object to jury instructions, we have held that the unobjected-to instructions, even if erroneous, become the law of the case, and we have judged the sufficiency of the evidence in accordance with the law established in the jury instructions. *See United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976) (element of specific intent became law of the case where defendant was indicted for "knowingly, wilfully and unlawfully escaping" and court instructed jury, without objection, that specific intent was required for conviction; therefore, court did not need to decide whether specific intent was an element of the offense; conviction reversed because Government failed to present sufficient evidence of specific intent); *United States v. Taylor*, 933 F.2d 307, 310 (5th Cir. 1991) (although statute did not require proof of specific intent, it became an element under law of the case doctrine when defendant was indicted for willfully escaping federal custody and government failed to object when court instructed jury that specific intent was an element; evidence was sufficient to prove specific intent)

We have not found any cases applying this principle in cases in which the defendant fails to object to a jury instruction and then

The Government responds that, although only a minimal effect is required, it proved that the activities of the enterprise had a substantial effect on interstate commerce. The Government relies on the following evidence: The Mexican Mafia engaged in drug trafficking and extorted a ten percent "tax" from drug dealers. Those who did not pay the tax were robbed or murdered. The money and property collected and stolen were used to finance the purchase of money orders that were mailed to Mexican Mafia members, many of whom were in prison, some in states outside of Texas. A letter from a Mexican Mafia member to Appellant Robert Perez referred to the availability of pure, uncut cocaine from Colombia. Mexican Mafia business was conducted by mail, including through letters from Mexican Mafia president Huerta, who was in prison in Kansas and then in Colorado, that were mailed to Texas. Mexican Mafia members used telephones and pagers to communicate Mafia business, and some of the telephone calls were placed from Texas to Mexican Mafia members in out-of-state prisons. Membership in the Mexican Mafia was not limited to Texas residents or Texas prisoners; some members were from California.

As we have previously noted, neither the Supreme Court nor our court has decided whether a RICO enterprise's activities must "substantially" affect interstate or foreign

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challenges the sufficiency of the evidence on a ground that is not consistent with the jury instructions. Were we to apply the principle established in those cases in this case, evidence that the enterprise's activities had a minimal effect on interstate commerce would be sufficient. We do not reach that question, however, in the light of our conclusion that the Government presented evidence sufficient to establish that the enterprise's activities had a substantial effect on interstate commerce.

commerce, or whether proof of a minimal effect is sufficient. It is not necessary for us to decide that issue in this case because the Government presented evidence that the activities of the Mexican Mafia satisfy the interstate commerce requirement for constitutionality of the act.

At the outset, we note that Congress has made persuasive findings that organized crime and drug trafficking, both of which are activities in which the Mexican Mafia was engaged, have a substantial effect on interstate commerce. In enacting RICO, Congress made the following findings regarding the effect of organized crime on interstate commerce:

> . . . organized crime in the United States annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; . . . organized crime activities in the United States weaken the stability of the Nation's economic system, . . . [and] seriously burden interstate and foreign commerce.

Congressional Statement and Findings of Purpose, Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

Congress has also found that drug trafficking substantially affects interstate commerce:

> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because- -

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

21 U.S.C. §§ 801(3)-(6). *See United States v. Lopez*, 2 F.3d 1342, 1366 n.50 (5th Cir. 1993) (noting "the now unchallenged federal authority over intrastate as well as interstate narcotics trafficking," and observing that "all drug trafficking, intrastate as well as interstate, has been held properly subject to federal regulation on the basis of detailed Congressional findings that such was necessary to regulate

interstate trafficking"), *aff'd*, 514 U.S. 549 (1995); *see also White*, 116 F.3d at 926 & n.8 (substantial effect on interstate commerce established where RICO enterprise was engaged in drug trafficking).

The activities of the Mexican Mafia -- narcotics trafficking, extortion from individuals engaged in narcotics trafficking, and committing other organized crime, including murders, to extort money and avoid detection -- clearly are among the kinds of activities that Congress has found to have a substantial effect on interstate commerce. The record contains overwhelming evidence that the Mexican Mafia engaged in drug trafficking, as well as extortion from drug dealers. The murders alleged as predicate acts were closely related to the enterprise's drug trafficking and extortion activities. There is evidence that at least some of the illegal drugs were obtained from sources outside the State of Texas. Instrumentalities of interstate commerce were used to conduct the business of the Mexican Mafia, and some of that business was conducted across state lines. Thus, the evidence presented in this case is sufficient to establish the interstate commerce element of the RICO charges.

4

Venue

Appellants argue that the Government failed to prove that any of the acts took place in the Western District of Texas, as alleged in the indictment. They do not argue that venue was improper.

In denying motions for acquittal on this ground, the district court, relying on maps of the areas where various acts took place, and noting that many of the acts occurred within the city limits of San Antonio, took judicial notice of the fact that San Antonio is in the Western District of Texas.

Appellants argue that the evidence was insufficient for the court to take judicial notice of venue. We disagree. The evidence showed that San Antonio was the headquarters of the Mexican Mafia and the area in which it operated. As Appellants acknowledge, most of the predicate acts took place in San Antonio. In the light of this evidence, as well as the maps of the area that were admitted into evidence, the district court did not err by taking judicial notice of the fact that San Antonio is in the Western District of Texas.

G

Brady, *Giglio*, and Jencks

Appellants argue that their convictions must be reversed because of violations of *Brady*, *Giqlio*, and the Jencks Act.[7] They contend that the Government violated due process and the Jencks Act by failing timely to provide to the defense the following items: (a) letters drafted by or on behalf of Government witness Estrada; (b) Estrada's immunity agreement; (c) papers signed by Estrada; (d) a written statement provided to police by Frank Rios; (e) a written statement provided to police by Mario Sanchez; and (f) a report written by Detective Bellamy. They contend that they were prejudiced because the failure timely to provide these documents prevented defense counsel from conducting effective cross-examination. We address each item in turn.

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[7] Although Appellants also refer to violations of *Brady* and *Giglio*, their arguments focus primarily on alleged Jencks Act violations.

1

Estrada Letters

Estrada sent FBI Agent Appleby three letters, the first of which was lost. Agent Appleby testified that the first letter was written for Estrada by another inmate. In it, Estrada offered to cooperate by providing information about the Mexican Mafia. He also related a threat that the Mexican Mafia had made against his life. The second letter listed homicides about which Estrada had information. Both this second and the third letters were provided to defense counsel during trial. After the letters were provided, defense counsel were allowed to question Agent Appleby about them. The district court denied defense motions to strike Estrada's testimony. Estrada then was recalled to the stand and defense counsel were allowed to further cross-examine him. The Government concedes that there is no good-faith exception to the Jencks Act, but argues that the district court, in refusing to strike Estrada's testimony, implicitly found that the first letter, which was lost, was not material or important to the defense.

Appellants have not demonstrated that they were harmed by the delay in producing the second and third letters, because they were allowed to cross-examine Agent Appleby and Estrada after receiving them. The district court did not err by refusing to strike Estrada's testimony because of the failure to produce the first letter, because Agent Appleby's testimony about that letter shows that it was not material to the defense. In any event, even if there was error, it was harmless.

2

Estrada Immunity Agreement

The Government asserts that, although it is clear that Estrada was granted immunity (he testified about it), there is no evidence of the existence of a written immunity agreement. Even assuming such an agreement exists, it is not a statement of a witness and thus is not covered by Jencks. In the light of Estrada's testimony about his grant of immunity, Appellants were not prejudiced by the failure to produce a written agreement (assuming it exists)

3

Papers Signed by Estrada

Estrada testified that he had signed some papers when he met with Agent Appleby, but he did not know the contents of the papers because he does not read or write. At a Jencks hearing, Agent Appleby testified that he never had Estrada sign any statements. The Government notes that Appellants did not ask the district court to make a ruling after the Agent's testimony. Appellants have failed to demonstrate that the papers existed or that, if they exist, they are statements covered by the Jencks Act or that they were material to the defense.

4

Rios Statement

Government witness Rios testified that he had given a written statement to a detective when he was arrested on a motion to revoke his probation, but that the statement did not address the matters covered in his testimony at Appellants' trial. Pena's counsel acknowledged receipt of the statement

after Rios had testified. The only Appellant who asked to have Rios re-called was Johns, who has not raised this issue on appeal. The Government asserts that this issue was not preserved for appeal because defense counsel failed to submit a copy of the statement for the record. Even assuming the issue was preserved, there is no showing that Appellants were prejudiced by the delay in receiving the statement. The statement is not covered by the Jencks Act, because it is not related to the subject matter of Rios's testimony.

5

Sanchez Statement

Mario Sanchez was a defense witness called by Michael Perez. During cross-examination, the Government referred to his sworn statement, and defense counsel claimed they had not received it. Although the Government stated that it had provided a copy along with the police report, the district court ruled that the Government could not use the statement for impeachment and ordered the Government to provide it to defense counsel. The Government did so the next day. The only Appellant who asked to re-call the witness was Johns, who does not raise this issue on appeal.

The Jencks Act does not cover statements of defense witnesses. Appellants do not allege, nor did they obtain a ruling, that the statement contains material exculpatory information. In any event, Appellants do not assert that the delay in receiving the document prejudiced them.

6

Detective Bellamy's Notes

The Government provided defense counsel with four or five pages of Detective Bellamy's notes, with some deletions. Appellants sought the entire document. Because it named informants, the Government asked the district court to review it *in camera* to determine whether it contained impeachment or exculpatory information. The district court denied defense counsel's request for the entire document, explaining that it was not Jencks material because Bellamy was not a witness, and that it did not contain any *Brady* or *Giglio* material. We find no error by the district court in this ruling.

H

General Verdict Form

Appellants contend that, in this complex criminal RICO trial involving multiple defendants, dozens of alleged predicate acts, and considerable opportunity for juror confusion and disagreement, the district court violated their due process rights by submitting a general verdict form, which asked only whether each of the defendants was guilty of the crimes charged in counts 1 and 2 of the indictment. The Appellants concede that the district court instructed the jurors that they must reach a unanimous verdict as to each racketeering act alleged to have been committed by each defendant. They argue, however, that the general verdict form did not adequately ensure that the jury recognize that it must unanimously agree as to each defendant's involvement in the same two or more specific predicate racketeering acts. They contend that a special verdict form was required by due process as a safeguard to ensure that the jury followed the court's instructions. Some of the Appellants also argue that

a special verdict form was necessary for the conspiracy count so that the jury could specify which overt acts each defendant had committed. The Government responds that special verdicts traditionally have been disfavored in criminal cases, and that the use of a general verdict form did not result in due process violations at sentencing.

We find no abuse of discretion or due process violation in the use of a general verdict form in this case. The district court instructed the jury that, to convict on the substantive count, it had to agree unanimously that each defendant committed at least two predicate acts, and that it must unanimously agree as to which two or more specific predicate acts each defendant committed. It further instructed the jury that it was not sufficient that some of the jurors find that the defendant under consideration committed two of the acts, while other jurors find that the defendant committed different acts.

The record here indicates that the district court's instructions were clear, and that Appellants were not prejudiced by the use of a general verdict form. Appellants have offered no basis for disregarding the presumption that the jury followed its instructions. Because commission of an overt act is not an element of RICO conspiracy, *see Salinas*, 522 U.S. at 62, the district court did not abuse its discretion by not submitting a special verdict requiring the jury to designate the overt acts committed by each defendant.

I

Apprendi

Appellants argue that their sentences were imposed in violation of *Apprendi* (decided a year after they were sentenced), because the district court enhanced their sentences to life imprisonment, in excess of the statutory

maximum 20-year term, on the basis of facts (murder, attempted murder, and aggravated robbery) not alleged in the indictment, presented to the jury, and found by the jury beyond a reasonable doubt. Appellants contend that, because they were charged with more racketeering acts than the two necessary for conviction, some of which are not punishable by life imprisonment, the general verdict form makes it impossible to tell whether the jury found them guilty of predicate acts punishable by life imprisonment. Some of the Appellants argue that the district court committed *Apprendi* error by failing to submit to the jury the drug quantity element of the predicate acts involving marijuana and cocaine. Some of them also argue that the district court did not instruct the jury on the elements of the predicate racketeering acts.

There is no *Apprendi* indictment error, because the indictment alleged the facts of the racketeering acts that were the basis of the enhanced sentences. There is no *Apprendi* instructional error, because the district court instructed the jury on the elements of each of the predicate racketeering acts and instructed that the jury's verdict must be unanimous as to each of the two or more specific racketeering acts alleged to have been committed by each defendant. Because there were no sentence enhancements based on the drug racketeering acts, the district court did not violate *Apprendi* by failing to submit the drug quantity element to the jury. Finally, the district court did not err by failing to instruct the jury as to overt acts, because proof of overt acts is not necessary for a RICO conspiracy conviction. *See Salinas*, 522 U.S. at 62. There was no *Apprendi* sentencing error, because the jury necessarily found that each Appellant committed at least one predicate act punishable by life imprisonment, as explained below for each Appellant.

Appellant Carrion was charged with three racketeering acts: possession with intent to distribute marijuana and two murders. Because the jury found him guilty of racketeering, which requires finding that he committed at least two racketeering acts, the jury necessarily found that he committed at least one murder, which is punishable by life imprisonment.

Ortegon was charged with four racketeering acts: possession with intent to distribute cocaine and three murders. Thus, the jury necessarily found that he committed at least one murder, which is punishable by life imprisonment.

Morales was charged with only two racketeering acts, one of which was murder. Thus, the jury necessarily found that he committed murder, which is punishable by life imprisonment.

Jesse Gomez was charged with seven racketeering acts, one of which was robbery and the remainder of which were murders. Thus, the jury necessarily found that he committed at least one murder, which is punishable by life imprisonment.

Because Remigio Gomez was charged with only two racketeering acts (attempted murder and aggravated robbery), the jury necessarily found that he committed both. Aggravated robbery is punishable by life imprisonment.

Because Michael Perez was charged with only two racketeering acts (both murders punishable by life imprisonment), the jury necessarily found that he committed both.

Herrera was charged with seven racketeering acts: five murders, one attempted murder, and possession with intent

to distribute cocaine. Because Herrera had prior felony convictions, the attempted murder is punishable by life imprisonment. Thus, the jury necessarily found that he committed at least one predicate act punishable by life imprisonment.

Because Johns was charged with only two racketeering acts, one of which was aggravated robbery, the jury necessarily found that he committed at least one act punishable by life imprisonment.

Robert Perez was charged with eight racketeering acts: six murders, one attempted murder (punishable by life imprisonment because he has a prior felony conviction), and possession with intent to distribute marijuana. Thus, the jury necessarily found that he committed at least one act punishable by life imprisonment.

Because Pena was charged with only two racketeering acts (murder and aggravated robbery), the jury necessarily found that he committed an act punishable by life imprisonment.

J

Ortegon: Denial of Motion for New Trial

Ortegon argues that the district court abused its discretion by denying him a hearing on his motion for new trial. He sought a new trial on the grounds that the verdict was against the weight of the evidence, newly discovered evidence, and perjured testimony. He argues that the district court erred by failing to make findings of fact independently weighing the evidence and assessing credibility. His argument regarding newly-discovered evidence pertains to the Estrada letters that are the subject of the Jencks Act claim discussed above. He claims that the lost Estrada letter was

written by Ramos and that, by the time the defense was put on notice of the lost letter, it was too late to secure Ramos as a witness and, in any event, neither the defense nor the prosecution knew Ramos's whereabouts. He maintains that the testimony of Ramos about the contents of the letter would have been material to his guilt, but he does not indicate what Ramos's testimony would have been. He claims that Estrada committed perjury by testifying that the murder of Emilio Alejandro was ordered by the Mexican Mafia. He bases this claim on Carrasco's knowledge that Estrada killed Alejandro because of a personal vendetta. He also claims that his girlfriend, Loera, committed perjury when she testified that he had used heroin at her house. Finally, he asserts that the district court should have conducted an evidentiary hearing on his motion. The Government observes that the motion referred to an affidavit of Loera offered to prove that she had committed perjury, but the affidavit was not attached and is not in the record.

We find no abuse of discretion. The verdict was not against the weight of the evidence. There is no support for the claim that Loera committed perjury; but even if Loera's affidavit had been attached to the motion, and assuming its truth, the fact that she lied when she testified that Ortegon used heroin did not affect the outcome of the trial. There is little support for Ortegon's assertion that Estrada lied about his reasons for killing Alejandro -- he might have had more than one motive. In any event, Ortegon fails to explain how he was prejudiced.

III

For the foregoing reasons, the Appellants' convictions and sentences are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50279

U.S. COURT OF APPEALS
FILED
NOV 08 2002
CHARLES R. FULBRUGE
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSE "CHANGO" GOMEZ, JR. also known as Changito Gomez; PETE CARRION; REMIGIO "TITO" GOMEZ; ROBERT "ROBE" HERRERA, also known as Rove Herrera, Jr.; JUAN "JON JON" JOHNS; MARTIN "PANCAKE" ORTEGON; ROBERT "BEAVER" PEREZ; VICTOR "TITO" PENA; MICHAEL PEREZ; LOUIS "BIG LOU" MORALES,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas,
San Antonio

Before JOLLY, DUHÉ, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Pete Carrion, Juan Johns, Martin P. Ortegon, Robert Perez, Victor T. Pena, Louis B. Morales, and Jesse Gomez, Jr. is **/ DENIED /.**

ENTERED FOR THE COURT:

/ s / E. Grady Jolly

United States Circuit Judge

APPENDIX C

tomorrow morning at 9:00.

COURT SECURITY OFFICER: All rise.

* * * * * *

(March 3, 1999).

(Defendants present).

THE COURT: The Court received a note last week and the attorneys were informed, the jury wanted to leave and did leave at noon last Thursday. One of the jurors had a job interview and the jury requested that they be allowed to leave early so that the juror could make a job interview. So the jury was excused early. That was the first note received Thursday at 10:49. And then yesterday at 3:00 o'clock the jury received (sic) a second note that said "We have reached a verdict" signed Ms. Siptak. Bring the jury in.

THE COURT SECURITY OFFICER: All rise.

(Jury entered courtroom).

THE COURT: Mrs. Siptak, you are the foreperson of this jury and I received a note from you yesterday that said the jury has reached a unanimous verdict as to each of the defendants.

Is that correct?

JUROR: Yes.

THE COURT: Would you give it to the bailiff?

Mr. Perez, if you would stand please with your attorney, Mr. McLeod. In the case of United States of America versus

Robert Perez, defendant, "Verdict: We the jury find the

Defendant Robert Perez, guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment." Signed by the foreperson and dated.

MR. MCLEOD: Could I make my motion for polling the jury?

THE COURT: Yes, sir. You may make that motion.

Mr. Herrera, if you would stand please with your attorney, Mr. Futrell. In the case of the United States of America versus Robert Herrera, "Verdict: We the jury find the defendant Robert Herrera, guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment," signed and dated by the foreperson of the Jury.

You may be seated.

Mr. Carrion, if you would stand please with your attorney, Mr. Robbins. In the case United States of America versus Pete Carrion, "We the jury find the defendant Pete Carrion guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment," signed and dated by the foreperson.

Mr. Gomez, if you would stand please with your attorney, Mr. McCarthy. In the case of the United States of America versus Jesse Gomez, "We the jury find the defendant Jesse Gomez guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment." Signed and dated by the foreperson.

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Mr. Remigio Gomez, if you would stand please with your attorney, Mr. Economidy. In the case of the United States of America versus Remigio Gomez, "Verdict: We the jury find the defendant Remigio Gomez guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment," and dated by the foreperson. Thank you.

Mr. Johns, if you would stand up please with Mr. Stenberg.

United States of America versus Juan Johns, "Verdict: We the jury find the defendant Juan Johns, guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment," dated and signed by the foreperson.

Mr. Morales, if you would stand please with your attorney, Mr. Sergi. In the case United States of America versus Luis Morales, "Verdict: We the jury find the defendant Luis Morales,

guilty as charged in Count One of the superceding indictment and

guilty as charged in Count Two of the superceding indictment,"

signed and dated by the foreperson.

Mr. Martin Ortegon, if you would stand please with your

attorney, Ms. Douenat. "Verdict: We the jury find the defendant

Martin Ortegon, guilty as charged in Count One of the

superceding indictment and guilty as charged in Count Two of the

superceding indictment," singed and dated by the foreperson.

Mr. Victor Pena, if you would stand please with your

attorney, Mr. Wolf. "Verdict: We the jury find the defendant Victor Pena, guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment," dated and signed by the foreperson.

In the case of Michael Perez, if you would stand Mr. Perez, with Mr. Camera, please. In the case of United States of America versus Michael Perez, "Verdict: We the jury find the defendant Michael Perez, guilty as charged in Count One of the superceding indictment and guilty as charged in Count Two of the superceding indictment," dated and signed by the foreperson.

Ms. Siptak, you are the foreperson. Did I read those correctly? Is that the unanimous decision of the jury?

JUROR: Yes, you did.

THE COURT: I'll assume that everyone wishes the jury polled, and I will poll the jury as to each defendant unless I'm told otherwise. Members of the Jury, the clerk of the Court is going to call out your name as to each defendant and we'll do

this ten times as to each one individual, and the question that is being asked is: "Is this your verdict." She will not repeat the question, she will simply call out your name, but as your name is called out, if you would please answer the question, "Is this your verdict," either "yes" or "no."

MR. CAMARA: Your Honor, if I could, Defendant Michael Perez does not want the jury polled.

THE COURT: Okay.

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COURTROOM DEPUTY: As to Robert Perez, Mr. Lawrence?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Doralee Turner?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Rodriguez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Stehling?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Wilkie?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Siptak?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Lopez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Taylor?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Recroft?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Parson?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Gonzales?
JUROR: Yes.
COURTROOM DEPUTY: And Ms. Hegland?
JUROR: Yes.
COURTROOM DEPUTY: As to Robert Herrera.

MR. FUTRELL: Your Honor, Mr. Herrera does not wish the jury to be polled.

COURTROOM DEPUTY: As to Pete Carrion.

MR. ROBBINS: We don't particularly care to have the jury polled.

MR. MCCARTHY: Neither does Jesse Gomez.

COURTROOM DEPUTY: As to Remigio Gomez. Mr. Lawrence?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Turner?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Rodriguez?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Stehling?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Wilkie?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Siptak?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Taylor?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Recroft?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Parson?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Gonzales?

JUROR: Yes.
COURTROOM DEPUTY: And Ms. Hegland?
JUROR: Yes.
COURTROOM DEPUTY: As to Juan Johns. Mr. Lawrence?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Turner?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Rodriguez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Stehling.
JUROR: Yes.
COURTROOM DEPUTY: Mr. Wilkie?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Siptak?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Lopez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Taylor?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Recroft?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Parson?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Gonzales?
JUROR: Yes.

COURTROOM DEPUTY: And Ms. Hegland?

JUROR: Yes.

COURTROOM DEPUTY: As to Luis Morales. Mr. Lawrence?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Turner?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Rodriguez?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Stehling?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Wilkie?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Siptak?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Lopez?

JUROR: Yes.

COURTROOM DEPUTY: Ms. Taylor?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Recroft?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Parson?

JUROR: Yes.

COURTROOM DEPUTY: Mr. Gonzales?

JUROR: Yes.

COURTROOM DEPUTY: And Ms. Hegland?

JUROR: Yes.
COURTROOM DEPUTY: As to Martin Ortegon. Mr.
Lawrence?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Turner?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Rodriguez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Stehling?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Wilkie?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Siptak?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Lopez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Taylor?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Recroft?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Parson?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Gonzales?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Hegland?

JUROR: Yes.
COURTROOM DEPUTY: As to Victor Pena. Mr. Lawrence?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Turner?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Rodriguez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Stehling?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Wilkie?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Siptak?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Lopez?
JUROR: Yes.
COURTROOM DEPUTY: Ms. Taylor?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Recroft?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Parson?
JUROR: Yes.
COURTROOM DEPUTY: Mr. Gonzales?
JUROR: Yes.
COURTROOM DEPUTY: And Ms. Hegland?
JUROR: Yes.

APPENDIX D

or give you one strike each.
MS. DOUENAT: I vote for a strike.
MR. ECONOMIDY: I vote to give Mr. Wyatt his occupational excuse.
THE COURT REPORTER: One at a time.
THE COURT: I'll give you each an extra strike. So you get 21. That means you have -- 21 strikes through 68, 11 strikes through 68. And then we go 68 through the end. This is the -- you get two more?
COURTROOM DEPUTY: Two for each side.
THE COURT: Two for each side. So you get 21 strikes up through 68.
MR. FUTRELL: And then one more after that?
COURTROOM DEPUTY: No, two more.
THE COURT: You say through 68, but 68 is off.
COURTROOM DEPUTY: Right.
MR. MCLEOD: Through 69?
THE COURT: Through 69.
COURTROOM DEPUTY: Start with 69 and go to 77 -- 79.
THE COURT: But 69 is included in the 21 strikes and the 11 strikes. Because then they go from 70 to -- 21 strikes through 69, 11 strikes through 69, and then two strikes for the Defense and two strikes for the Government, with 70 to the end.
Do you want to sit here and talk to your clients about it? I will excuse the jurors and let them go out.

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1 MR. WOLF: Is the Government going to go in another
2 room?
3 THE COURT: I don't know, but do you guys want to talk
4 to your clients?
5 MS. DOUENAT: We also would like to confer with each
6 other.
7 THE COURT: But I will excuse the jury. Okay. One
8 more time. Why don't y'all go on downstairs and I will be
with
9 you as soon as we can. Isn't this fun?
10 (Off-the-record discussion).
11 (Counsel conferred).
12 THE COURT: If it's all right with you, I'm just going
13 to send the jury clerk downstairs, call out the names of
those
14 that are on the jury and have them come up. Rather than
15 bringing everybody up here, I'm just going to tell her to
go
16 down there and call out the names and bring those up that
are on
17 the jury.
18 MR. MCCARTHY: Judge, are you going to keep the
other
19 panel down there?
20 MS. MCLEOD: We might have possible Batson
challenge.
21 THE COURT: Yeah.
22 MR. MCCARTHY: We have to do it before you dismiss
the
23 other panel.
24 THE COURT: Yeah. Go ahead and call their names up
and
25 keep the rest of the panel. And don't bring them in yet,
but

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1 start bringing them up.
2 (Brief recess).
3 THE COURT: Who do we have? Number one is number 6,
4 Rocky Lawrence, number 2 is number 7, Doralee Turner; number 3
5 is number 15, Roel Rodriguez; number 4 is number 16, Irene
6 Stehling; number 5 is Edward M. Wilkie, number 19; number 6 is
7 number 23, Vicki M. Siptak; number 7 is number 25, Ramiro Lopez;
8 number 8 is number 26, Nora Taylor; number 9 is number 37, Maria
9 Gomez; number 10 is number 42, Rollin Recroft; number 11 is
10 number 53, Larry Parson; and number 12 is number 54, Juan
11 Gonzales; alternate number 1 is number 72, Diane Hegland;
12 alternate number 2 is number 76, Mike Mena; alternate number 3
13 is number 77, Lois Norket; alternate number 4 is number 78,
14 Carolyn Garcia. Anything from anyone before I bring the jury
15 in?
16 MR. MCLEOD: We are still counting. I have a motion to
17 have a hearing to determine the Batson challenge.
18 THE COURT: Okay.
19 MR. MCLEOD: I would like to call David Sergi as my
20 witness. Can he testify from here, Your Honor?
21 THE COURT: That's fine.

MR. MCLEOD: David, I'll ask you a couple of questions. Are you familiar with the clients in this case, specifically my client, Robert Perez?
MR. SERGI: Yes, I am.

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MR. MCLEOD: Are you able to distinguish between Anglo-
Saxon, Mexicans, blacks, and whites.
MR. SERGI: Yes, I am.
MR. MCLEOD: Have you reached an opinion as to the ethnicity of my client, Robert Perez?
MR. SERGI: I believe he is Hispanic.
THE COURT: I think everybody stipulates that the 10 defendants are Hispanic. Is there anybody who doesn't? Okay.
Let the record reflect that all 10 defendants on trial are Hispanic, all Latinos, or whatever is the politically correct
term.
MR. MCLEOD: Your Honor, I would move that the panel be
struck on the basis that the U.S. Government has struck at least
six, that I can tell, that are Hispanic, out of their 11
strikes, and they -- in their alternate strikes, they struck two
that are Hispanic, which I think would be discriminating against
people of the Hispanic ethnicity and would warrant this panel
being excused and another jury panel being provided.
MR. SERGI: I would join in that motion.
MR. ECONOMIDY: Defendant Remegio Gomez does not join
that.
THE COURT: Okay. And let the record reflect everybody
else joins?

24 MR. MCCARTHY: Yes, Judge. Can we have a hearing on
25 that, as far as present evidence, asking the U.S. Attorney why

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he made some of the strikes?
THE COURT: Yeah. Is there anything else to present?
MR. MCLEOD: We have nothing else.
THE COURT: What sayeth the Government?
MR. MCCARTHY: I would like to do direct examination of him.
MR. SERGI: Actually, Your Honor, I would like to see the notes of the Government on each of the Hispanic --
THE COURT: I will let the Government respond. Mr. Baumann?
MR. BAUMANN: Judge, I think they are going to have to identify which juror -- prospective juror they believe was stricken, based on a racially biased choice.
THE COURT: It is a person, which one?
MR. SERGI: Juror number 79. Juror number 74.
THE COURT: Just give me one at a time.
MR. SERGI: Number 79.
THE COURT: Who is that?
MR. SERGI: Jesus Castillo.
THE COURT: Well, let's start from the top. Those are alternates. Do you have the list?
MR. SERGI: First of all, those that are not double strikes, Your Honor, number 12, Mr. Graf.
THE COURT: Mr. Graf? Why did the Government take off Mr. Graf?

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MR. BAUMANN: Your Honor --
THE COURT: He did have a bar and we'd all have a place
to go after work, but...
MR. MCCARTHY: Is this sworn testimony, Judge? Is he sworn?
MR. BAUMANN: Yeah. Were you sworn?
THE COURT: Go ahead and answer.
MR. BAUMANN: Yes, sir. Your Honor, the prospective juror was inattentive at times, was observed to have his eyes
closed at times, during the voir dire by the Court, he is a bar
owner. He stated he does not read the newspaper, and also
stated that he had heard something about the Mexican Mafia.
Those were the Government's observations, and based on those
observations, the Government believes that he would not be a
good candidate for jury service in this case.
MR. SERGI: Your Honor, I would at this point, request
Your Honor, that we review a copy of the Government's notes,
both from Mr. Baumann and Mr. Counts, as well as from the agents
assisting them, relating to that juror.
THE COURT: That request is denied.
MR. SERGI: Your Honor, I believe we are entitled to
review those notes.
THE COURT: Any others?
MR. MCCARTHY: Your Honor, could we finish with Mr.

25 Graf?

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THE COURT: I asked if there were any others. What's the other one?
MR. MCCARTHY: On Mr. Graf, will the Court reflect that he is Hispanic?
MR. BAUMANN: I don't know if he is Hispanic.
MR. MCCARTHY: He looks Hispanic to me.
MR. STENBERG: Francisco, get serious, Graf, was Hispanic.
THE COURT: I don't know. Francisco, get serious, Graf. It doesn't sound Hispanic to me.
MR. MCCARTHY: Judge, if we could then, I would like to call Mr. Graf in and ask him --
THE COURT: Okay. What else? Who else? Any others?
MR. SERGI: Yes, sir, Your Honor. We would also -- Juror Number 56, Mr. Flores --
THE COURT: 56 Flores. Mr. Baumann?
MR. BAUMANN: Your Honor, the Government believed that Mr. Flores' employment as a psychologist, his focus on learning disorders, particularly with young people would make him an inappropriate candidate to hear the evidence in this particular case, considering the nature of the evidence in this case. Essentially, it is an observation based on his employment, and the fact that he -- we believe would be a decision-maker and could conceivably sway this jury.
MR. SERGI: Your Honor, I believe Mr. Baumann's

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1 testimony, therefore, reveals a bias against young people,
2 individuals, and I believe, Your Honor, aid is also one of
the
3 impermissible issues under Batson. I believe, Your
Honor, Mr.
4 Flores should be instead, on the jury panel.
5 THE COURT: Any others?
6 MR. SERGI: Yes, Your Honor. The next one would be
66
7 Mr. De La O. Your Honor, we would also, at this point,
also
8 like to request the notes regarding Mr. Flores and also
make a
9 running request for the notes regarding each of the other
10 individuals that we will be --
11 THE COURT: Mr. De La O?
12 MR. MCLEOD: Their reason for striking De La O.
13 MR. BAUMANN: Your Honor, the Government
believed that
14 Mr. De La O had a very, very strong accent, and might
have a
15 difficult time understanding and communicating with
other jurors
16 on the panel. The fact that he was single, the nature of
his
17 employment, we believe also contributed to our decision.
18 THE COURT: The nature of his employment as a
teacher?
19 MR. BAUMANN: Special ed teacher, Your Honor.
Might
20 make him an inappropriate choice in this particular case,
21 considering the nature of the evidence in the case.
22 MR. MCCARTHY: Your Honor --

23 MR. BAUMANN: We were predominantly concerned with his
24 very strong accent and difficulty communicating.
25 MR. MCCARTHY: Judge, I would like the record to note

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that Mr. O is Hispanic, also.
THE COURT: Yeah. Who else?
MR. SERGI: Your Honor, I believe there is another special ed teacher, Your Honor, that was not stricken. In addition, Your Honor, going back up to the list, Mrs. Saldana,
juror number 5.
MR. BAUMANN: Mrs. Saldana's son was accused of a crime. She also stated that police fudged a report. She doesn't read the newspaper and had heard about La Mafia, but she
misunderstood and believed the La Mafia was the Mexican Mafia,
and that is, in fact, the musical group. So we do not believe
she would be an appropriate candidate, based on that.
MR. SERGI: Your Honor, I ask for the notes from the Government regarding Mrs. Saldana. Next, Your Honor, we would
have number 27 --
MR. BAUMANN: What number?
MR. SERGI: Number 27.
THE COURT: Villasenor.
MR. SERGI: Villasenor. Sorry. Your Honor, are we going to get a ruling?
THE COURT: Yeah, I'm waiting. I'm waiting for all of them. Villasenor?
MR. BAUMANN: Your Honor, Mrs. Villasenor is a divorced
lady, she was very talkative during voir dire. She also stated
that she was a witness for the defendant in a slip-and-fall

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1 accident. We believe, based on all of those reasons, that she
2 would not be a sympathetic Government juror in this case.
3 MR. SERGI: Your Honor, the next would be number 73,
4 Thomas Lara.
5 MR. BAUMANN: Your Honor, Mr. Lara stated in response
6 to a question from the Court regarding what he had heard or the
7 indictment, I'm not sure which, in a loud and confident voice,
8 quote, "They were only accusations." We believe that that
9 statement indicated a bias in favor of the Defense in this
10 case. I have no idea whether this man is Hispanic. Thomas R.
11 Lara, L-a-r-a. I certainly can't remember him, but I don't have
12 a clue whether he is Hispanic or not.
13 MR. SERGI: Last but not least, Your Honor, would be
14 juror number 79, Mr. Castillo.
15 MR. BAUMANN: Mr. Castillo stated the police fudged a
16 report. Was very loud, very aggressive during voir dire. And
17 the Government's opinion is that he's not going to be a
18 sympathetic juror to the Government's case and would be an
19 advocate in the jury room.
20 MR. SERGI: Your Honor, I believe that is it in terms
21 of the --
22 THE COURT: The Court will hold this matter in abeyance
23 and will ask that any notes with regard to the jury selection

24 from the Government or its agents, be recovered and given to the
25 Court for review. So if you would get everything from you and

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Mr. Counts and the agents, put it together and get it to me for review and I will hold this matter in abeyance.
MR. SERGI: Your Honor, are you going to dismiss the rest of the jury panel then?
MR. MCCARTHY: I believe the case law states that --
THE COURT: Well, if I grant it, then we'll come back and start with a new panel.
MR. MCCARTHY: Otherwise, it is denied. Is it denied now?
THE COURT: Well, if I grant it, then that's an improper jury and we'll come back with a new panel and start again.
MR. SERGI: Your Honor, my understanding of the case law was that we are then entitled to stricken veniremen as members of the jury. If you find on some, but not as to all, unless you find make a finding that the racial anamous (phonetic) was pervasive, or the age-based anamous was pervasive.
THE COURT: Well, what's the Government's position on this matter, Mr. Baumann?
MR. BAUMANN: Judge, you can look at the notes now. We don't keep notes relating to the ethnicity of jurors. We have no problem with the Court looking at the notes right now, if you want to.
THE COURT: Okay. Well, I'm going to -- Where is

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Norma? I'm going to go ahead and bring those that are here now,
into the courtroom, excuse them till 1:30 Wednesday, and then
ask those people to come back on Wednesday, as well, Saldana,
Villasenor, Sanchez, Graf, De La O, Lara and Castillo, tell them
to be here.
MR. MCCARTHY: All the ones that the Government struck
that were Hispanic, Judge?
THE COURT: Yes, that you say are Hispanic.
MR. SERGI: Your Honor, we would concede the ones that
were double strikes, this would only be -- the only reason we
brought those up was to show the pervasiveness, in terms of --
THE COURT: Okay. So there was Saldana, Graf,
Villasenor, Flores, De La O, Lara and Castillo?
MR. SERGI: Yes, sir. Your Honor, the double strikes
would have been Saldana and --
MR. FUTRELL: Double strikes we are conceding. So we
only need to know the ones that were not.
THE COURT: Because y'all brought up others. So which
ones are the ones that --
MR. SERGI: The ones that need to come back, Your
Honor, would be number 12, Mr. Graf; Number 56, Mr. Flores; and
number 66, Mr. De La O, number 73 and number 79.
THE COURT: Okay. Graf, Flores, De La O, and who

24 else?
25 MR. WOLF: 73 and 79.

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1 THE COURT: Lara and Castillo. Graf, De La O -- Did
2 you say Flores?
3 MR. SERGI: Flores.
4 THE COURT: Did you say a Sanchez or Saldana?
5 MR. SERGI: Graf, Flores, De La O, Lara and Castillo.
6 THE COURT: Ms. Wagoner, could you ask those people
to
7 come back at 1:30, those names we just called? And bring
those
8 five along with the others that are still on the jury, bring
9 them up here.
10 MS. WAGONER: Okay.
11 THE COURT: The 16 we've chosen and those five, and
12 everybody else is excused.
13 MS. WAGONER: Okay. And that's Graf, G-r-a-f, or
14 Craft?
15 THE COURT: Graf, 12; Flores, 56; 66 De La O; 73,
Lara;
16 and 79 Castillo. And excuse everyone else.
17 (Panel entered courtroom).
18 THE COURT: There are a few others of you-all coming
up
19 so hold on a second. We didn't call out everybody's
names.
20 We've got a few more. We don't have room for you
there, but we
21 still aren't quite sure who our complete jury is going to
be.
22 So be patient, we'll bring them up and then we'll get you
out of
23 here hopefully, unless we can do night court. Anybody
from out
24 of town? Where are you at?
25 PROSPECTIVE JUROR: Kenedy.

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THE COURT: How far away?
PROSPECTIVE JUROR: 70.
THE COURT: 70 miles Kenedy.
PROSPECTIVE JUROR: Pleasanton. 30 miles.
PROSPECTIVE JUROR: Sisterdale, 50 miles.
PROSPECTIVE JUROR: New Braunfels.
THE COURT: 35, more or less.
PROSPECTIVE JUROR: Big Wells, 100.
THE COURT: Those that came from over 70 miles can stay overnight and you are reimbursed, which you are and you are on the bubble, I guess you qualify, I'll say you qualify. So those of you that came from over 70 miles, if you want to bring a suitcase and stay at a reasonable hotel, you may. Any of y'all from out of town? No? Okay. We haven't quite finished yet, completing the jury, but those of you that are here are going to make up our jury. There are some very important things that you've got to keep in mind. As you know, I asked all of you some questions about anything that you might have heard about this case or about allegations or things involving this case, because it is real important that you make up your mind based upon what you hear here in the courtroom. So you can't go out

22 and do any investigation, ask anybody for help or advice, or if
23 you go home and you tell your family, "Hey, I'm on this case" or
24 somebody at work, "I'm on this case," say, "Oh, yeah, I read
25 about it, this is what I heard." Don't let anything like that

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happen. Don't read anything, avoid anything on TV if there is something on TV. Don't let anybody try to tell you that they heard about it and this is what they think. You should try to avoid any information about this case outside the courtroom. So please don't go out and investigate anything, don't find out more about it. Just put it out of your minds and I will give you more instructions Wednesday. We are going to not work tomorrow and we're not going to work Wednesday morning. We won't come back till Wednesday at 1:30. So Wednesday, I'll let you go back and make arrangements. We'll be here for several weeks. Those of you that are from over 70, if you want to stick around and stay at a reasonable hotel, you get reasonable expenses. The rest of you will have to come in. What time would be a good time to start in the morning or maybe I'll let you think about that, if you want to start either at 8:30 or 9:00. I don't think we'll start earlier than that. But I'll let you think about it and then we'll discuss it Wednesday afternoon what kind of schedule we want to work. We'll usually stop around 5:00, 5:30 or so. But again, don't go out and get any outside information. Avoid any outside information. Don't

read anything about this case, don't let anybody at home try to
tell you anything about this case, avoid any television. Don't
see any of that. It is going to be your decision based on what
you hear here, so don't have any outside influences. With that,
I will go ahead and excuse you and ask you to come back. Be

down in the jury room with Ms. Wagoner at 1:30 on Wednesday.
Any questions? Yes, sir?
JUROR: Sir, what is our role in this?
THE COURT: I'm just telling them, we haven't decided completely yet who the jury is. So some of you are going to be here, and maybe some of you are not. So this is the group from which our jury is composed of. There are still about, what are y'all, 21 or something of you? So we haven't completed the selection yet, but you're 21, this is what's going to make up our jury. So please, I wanted to instruct you, don't go out and look for any outside information, let anybody at home try to tell you how to do your business here. It is going to be your decision based on what you hear. So if you be down in Ms. Wagoner's place where you were this morning, where you've been all day. Thank you very much. I know it's been a long day. I appreciate your time. We'll have other days where maybe we'll get to get off a little early. So starting tomorrow, already you got a day off. And Wednesday, you only work half a day. So I'll see you Wednesday about 1:30 then.
THE COURT SECURITY OFFICER: All rise.

(Panel exited courtroom).
THE COURT: Okay. I guess I'll see y'all about -- Let's make it 1:00 o'clock. I told the jury 1:30, but let's try to make it about 1:00 o'clock, see what other preliminary things that we have.

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(Proceedings ended at 8:00 p.m.).

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APPENDIX E

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.